

After Defeat

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Last night the clock struck eleven at Big Ben in Westminster, and what happened was: nothing. The moment when, after two years of fierce and passionate struggle, the United Kingdom of Great Britain and Northern Ireland was finally to throw off the fetters of European law and step out into the world free and unbound – it came, it was, it passed. This non-event is a symbol, and since the British yellow press in all its Brexit jingoism has a keen sense for symbols, two of them put [Big Ben](#) with its [clock](#) on their front pages on Friday. Whether, when and under what conditions Brexit will finally occur, whether that matter can even be properly decided upon at all any more, all that is more unclear than ever after the renewed defeat of Prime Minister Theresa May and her Withdrawal Agreement in the House of Commons. But it is precisely this absence of clarity, in contrast to the clear, unequivocal cut on 29 March at 12:00 pm CET which so many have longed for, that is the symbol of an immense historical failure. Even now, when nothing else is clear, one thing is: no matter from which political side you look at it, this went wrong. This was a failure. This is a defeat.

The whole Brexit issue is so hopelessly complicated not least because several different conflicts interfere with each other in a highly complex way. What is being presented on the gilded stage of Parliament is an internal constitutional conflict over who makes collectively binding decisions in the UK. This conflict, it seems, brings forth only losers in each and every round, time and time again: the government gets nothing accomplished, the parliament nothing decided and the people not what it has ordered, each party ever more bewildered and aghast and angry, while this conflict spirals ever deeper into the flesh of the British constitution, and it never ever ends, but instead produces in a ghastly perpetuated draw only ever new, immeasurably rising costs.

Against time

At the same time, however, Brexit is, or rather: was a conflict between the UK and the EU, and that strand of conflict, unlike the internal constitutional one, appears to be settled for good. The British example had threatened to turn the exit option into a policy instrument for eurosceptic parties and governments to promote their political aims with, to the detriment of the Union. The EU fought hard to prevent this, and it has succeeded. The EU was better prepared, strategically nimbler, it was determined and united, and it prevailed. By insisting from the outset that negotiations could only start after the formal exit declaration under Article 50 TEU, it forced the UK to negotiate against the clock. It knew what it wanted and it knew what it did, it continuously had the edge over the opposing sovereign state, the fact notwithstanding that this state was in possession of one of the most ancient and revered and feared diplomatic traditions in the world. The much-ridiculed Brussels bureaucrats, it turned out, were to be reckoned with, while their sovereigntist

counterparts came across as inept snivellers who have little else to show for themselves but whining about the nasty EU protecting its interests. The EU has won, the UK has lost. This is the defeat symbolised by the chime at Westminster last night at 11 pm.

One consequence of this defeat is that Eurosceptics in the common sense of the word have become as rare a breed throughout Europe as Bonapartists after the Battle of Waterloo. With the exception of a few marginal extremists, no-one is campaigning for the upcoming EP elections with the promise of their country's withdrawal from the EU. Vilifying European integration per se seems to be no longer an attractive political message across the board. With the British gone, the classic eurosceptic ticket will largely disappear from the European party landscape, for lack of demand.

Nevertheless, no-one in the EU feels much like triumphing after this big win, and that's perfectly appropriate. Firstly, the Eurosceptics haven't disappeared nor been converted. They have only switched strategy. They no longer want to quit the EU, but rather forge it into a tool of their authoritarian ideas of national sovereignty, social normality and ethnic homogeneity, transform it into an organisation that won't get into their way when they subjugate their judiciary or mistreat migrants, but on the contrary makes itself useful to them for their pursuit of pure populist power. At the end of May, they strive for a majority to achieve just that. (Ceterum censeo: GO VOTE, do NOT vote for ORBÁN, and convince 10 PEOPLE TO DO THE SAME!!)

Clementia Caesaris

Secondly, triumphalism in general is an attitude that the EU should avoid in its relations with the British as with anyone else, in its own interest. There is already no lack of resentment against the 'elites of Brussels' both inside and outside the UK. Not to feed this resentment more than absolutely necessary is a command of reason.

After the time crunch that the British government got itself into by pressing the Article 50 button, the clock keeps on ticking just as mercilessly as before: while the withdrawal period can be extended by mutual agreement, the EP elections scheduled for May severely limits the options of all parties concerned. The UK would have to take part in the elections if it were still a member of the EU on that date, even if only for a few days, weeks or months. [FRANZ MAYER](#) had already pointed out this problem on Verfassungsblog at the beginning of February. The current extension of the deadline could only be granted until 12 April, because by that date at the latest the UK would have to submit electoral lists for the European elections. Any further extension only seems possible if the British are somehow given a waiver of that obligation. And how can this be done without damaging the democratic legitimacy of the European Parliament, jeopardizing the validity of all its decisions and compromising the entire EU constitutional setup?

Now, the UK legal community luckily has some of the sharpest minds in European law in their midst, and many of them have put their minds to find a solution to that riddle. For example, a group of prominent EU law experts led by Lord David

Anderson has [suggested](#) that the right of British EU citizens to an equal vote in the EP elections under Article 39 of the Charter of Fundamental Rights could be proportionately restricted in this respect. Neither would the decisions of the European Parliament all be null and void if no EP elections in the UK would take place, nor would UK breach its treaty obligations interpreted in the light of Article 50. And also from a democratic point of view, it seems to me not completely off the wall to take the view that people who would already have quit the club if it weren't for a temporary stay their government has explicitly begged for, wouldn't necessarily have to be entitled to equal say over the future of the EU, as far as democratic legitimacy is concerned.

Kill switch

[ARMIN CUYVERS](#) also warns on Verfassungsblog against too much constitutional rigidity with regard to the **British** needs: If a member state could actually blow up the entire EU constitutional order by refusing to take part in the EP elections, then this would give member states an enormous potential for blackmail. European law could not consistently insist on such a "kill switch".

Among those who keep denying Theresa May the necessary majority for her Withdrawal Agreement with particular persistency is the **Northern Irish** DUP. Their argument that the so-called backstop for Northern Ireland would undermine the integrity of the United Kingdom is dismantled by [NIKOS SKOUTARIS](#).

According to [EKKEHART REIMER](#), it is not just the UK parliament that needs to approve the Brexit deal, but also the **German Bundestag**, in order to meet its "disintegration responsibility" under German constitutional law. And the same would go for the extension of the Brexit deadline. [HEIKO SAUER](#), however, takes a decidedly different view.

International lawyers are used to grief from the **USA**, but President Trump's recent announcement to recognize the Israeli annexation of the Syrian Golan Heights has taken their alarm to a completely different level. [STEFAN TALMON](#) compiles a picture from this and many other attacks on international law which shows that the USA under Trump not only place their interests above international law if necessary, but are targeting international law as such.

Russia's so-called anti fake-news legislation is inspected by [ORESTE POLLICINO](#) who has participated in a workshop in Moscow and is rather appalled by what he has learnt.

In **Lithuania**, the Constitution was amended and citizens were given the right to complain about fundamental rights violations directly before the Constitutional Court. The background is explained by [AGNE LIMANT#](#).

In **Turkey**, President Erdoğan is currently in his second term of office, and [CEM TECIMER](#) describes the different scenarios of how long he could remain in power

under the current constitution specially tailored to his needs. Depending on the interpretation, the answer is between 2023 and 2033.

In **Hungary**, the CEU is no longer the only academic institution to be targeted by the Fidesz government. [TAMAS DESZO ZIEGLER](#) examines how the systematic restriction of scientific freedom in Hungary works.

In **Germany**, the Federal Home Secretary intends to punish refugee helpers if they alert those affected to their impending deportation. [MAX PICHL](#) sees the principle of effective legal remedy and the rule of law in danger.

China's latest White Paper on human rights has caused quite a stir abroad. [ADELE CARRAI](#) unfolds what the paper contains and entails.

In our current [online symposium](#) on the new **EU** defence policy, organiser [JELENA VON ACHENBACH](#) is joined by [SEBASTIAN GRAF VON KIELMANSEGG](#), [MORITZ WEISS](#), [FALK OSTERMANN](#), [ANNA MROZEK](#) and [CAROLYN MOSER](#) with noteworthy contributions.

Elsewhere

[PHILIP ALLOTT](#) believes that the short-term extension of the Brexit deadline could be seen as incompatible with Art. 50 TEU, with the result that the **UK** would be a regular EU member again for the time being, and the two-year deadline could be set anew with a new Brexit declaration. [RICHARD LANG](#), for one, is unconvinced.

[MANUEL MÜLLER](#) sees the blame for the Brexit disaster less in Theresa May's shortcomings than in the structural consequences of **European** disintegration.

[AURÉLIEN ANTOINE](#) examines the key role of Attorney General of **England and Wales** Geoffrey Cox in the Brexit drama.

[LEWIS GRAHAM](#) is concerned about an ECtHR decision in a **Ukrainian** case and worries whether the ECtHR will apply stricter standards in Eastern Europe when it comes to the assessment of life imprisonment.

[OLIVIER BEAUD](#) reports on his participation in the "Grand Débat" with **French** President Emmanuel Macron and what he learned about his constitutional plans and considerations.

[HANS-MARTIEN TEN NAPEL](#) examines the political-theological rhetoric of the winner of the **Dutch** regional elections, the right-wing populist Thierry Baudet.

[ZAMIRA DJABAROVA](#) points out the new tactic of the **Polish** government to subjugate the judiciary through disciplinary proceedings. [PIOTR BURAS](#), [JOHN DALHUISEN](#), [GERALD KNAUS](#) and [MAGDALENA MILENKOVSKA](#) in a detailed report urgently call on the EU Commission to initiate further infringement proceedings against Poland.

[LEIV MARSTEINREDET](#) takes a closer look at the vice-president of **Brasil** before the backdrop of the right-wing extremist president Bolsonaro's recent plunge in the popularity polls.

[ILYA SOMIN](#) is concerned about the fact that the conservatives among the **US** Supreme Court Justices have halted the execution of a Buddhist death-row inmate because he wasn't allowed the same right to spiritual assistance as Christians, while they saw no reason to intervene in another recent case about a Muslim prisoner.

[DAVID SUPER](#) is astounded about the phenomenon that is Alexandria Ocasio-Cortez.

That's it for now. Next week I will be travelling most of the time, and the week after that as well. I'll be heading southeast. Balkan-bound, and very excited about that. More about this in my next editorial. In the meantime, all the best, and take care

Max Steinbeis

